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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 676

SERVE YOURSELF GASOLINE STATIONS ASSOCIATION, INCORPORATED, ET AL.,
Appellants,

vs.

A. A. BROCK, AS DIRECTOR OF THE DEPARTMENT OF AGRICULTURE OF THE STATE OF CALIFORNIA, ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

EDMUND G. BROWN,
Attorney General,
FRANK J. MACKIN,
Assistant Attorney General,
Counsel for Appellees.

JOHN F. HASSLER,
Deputy Attorney General,
Of Counsel.

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. L. A. 21968

SERVE YOURSELF GASOLINE STATIONS ASSOCIATION, INC., A CORPORATION, ET AL.,

Appellants,

VS.

A. A. BROCK, AS DIRECTOR OF THE DEPARTMENT OF AGRICULTURE OF THE STATE OF CALIFORNIA, ET AL.,

URICH'S SERVE YOURSELF STATIONS, INCORPORATED, A CALIFORNIA CORPORATION, ET AL.

APPELLEES' OPPOSING STATEMENT

Come now defendants, respondents and cross-complainants, appellees herein, and file this their Statement Disclosing Matters and Grounds Making Against the Jurisdiction of this Court, as asserted by appellants.

Appellants' *Statement as to Jurisdiction* declares, at page 2, lines 8-14, that:

> "This case at its inception was an action to enjoin the enforcement of the hereinafter cited provisions of the Business and Professions Code of the State of California on the grounds that they were violative of the United States Constitution. The trial court held the statutes valid and refused to enjoin the enforcement of them against plaintiffs, appellants herein."

In their Amended Complaint for Injunction and Declaratory Relief, plaintiffs attempted to allege three causes of action,—the first two for injunction, the third for declaratory relief. Paragraph XIII of the first cause of action alleged that:

> "The sections of Business and Professions Code set forth in Exhibit 'A' are unconstitutional and void in that they take the property of plaintiffs without due process of law in violation of the provisions of the United States Constitution and the Constitution of the State of California. Said statutes are an unconstitutional restriction upon the legitimate business activities of plaintiffs, and further, said statutes, if enforced, are an arbitrary, unnecessary and discriminatory exercise of the police power of the State of California. Said statutes are violative of the provisions of the United States Constitution, Amendment XIV, Section 1, and the California Constitution, Article I, Sections 1, 3 and 13, and Article IV, Section 25, Subdivision 33."

The second cause of action re-alleged all paragraphs of the first cause of action and added one further paragraph (XVI), as follows:

> "Said sections of the Business and Professions Code if applied to the signs of plaintiffs or a sign reading 'Serve Yourself and Save' or 'Serve Yourself and Save 5c' or signs of similar wording, results in unconstitutional applications of said statutes to plaintiffs and to each of them."

The trial court, in the Law and Motion Department, filed a Memorandum Ruling reciting in part as follows:

> "In *Brock* v. *Superior Court*, 12 Cal. 2d 605, the factual allegations of the complaint supported the conclusions that the law either was unconstitutional or was being unconstitutionally applied. The court does not feel that the allegations of the first and second causes of action support the conclusions of law which

> are pleaded in paragraph XIII of the first cause of action (see *Callahan* v. *Broderick*, 124 Cal. 80)."

The court then sustained demurrers to the first and second causes of action and allowed ten days within which to amend the complaint. Plaintiffs thereupon gave Notice of Ruling wherein, among other things, they advised:

> "You are further notified that plaintiffs do not intend to file an amended complaint and therefore defendants have ten days within which to answer the third cause of action of the amended complaint on file herein."

Defendants joined issue on the third cause of action and filed cross-complaint. The Memorandum Ruling and Notice of Ruling were not a part of the record on appeal. Copies of the documents, certified by the clerk of the trial court, are appended hereto as Exhibits "A" and "B".

It is thus apparent that the constitutional point was initially raised in connection with an application to enjoin, as asserted by appellants. However, the point was promptly abandoned by the election not to amend to state facts supporting the recited conclusions of law. The Amended Complaint recited no facts showing or tending to show that the statutes are unconstitutionally applied as to plaintiffs. By their terms, the code provisions are applicable to all persons engaged in the business of selling gasoline, whether "serve-yourself" type operators or others. While it is true that the trial court refused to enjoin enforcement of the statute, it is also true that plaintiffs were granted leave to amend their complaint to state facts supporting the conclusions of law. Instead, plaintiffs elected to go to trial on the cause seeking a declaration of rights and duties upon the bare allegation of a constitutional question. The claim of deprivation of right under the due process clause was first raised in briefs and arguments, which are not a part

of the record (*Zadig* v. *Baldwin*, 166 U. S. 485). However, the Supreme Court of California has passed upon the question and the deficiency is cured (*Charleston, etc.* v. *Alderson*, 324 U. S. 182). Appellants' *Assignment of Errors* recites (page 2) that the California Supreme Court erred in holding that the sections are not being unconstitutionally applied to appellants. There are no allegations of facts and there is no evidence in any way supporting the instant assertion that the Code provisions are unconstitutionally applied.

At page 3 of the *Statement as to Jurisdiction*, appellants declare that the question is whether the State can competently forbid the display of a sign which reads "'Serve Yourself and Save', which sign tells the truth". The Amended Complaint alleges that plaintiffs also display signs advertising "Serve Yourself and Save 5¢"; the parties stipulated that such signs, maintained by some of the plaintiffs, were not changed when the price of gasoline no longer reflected a saving as great as five cents. The assertion of appellants, that their signs "tell the truth", is contrary to their pleadings and to the evidence. The California statutes are directed against false and misleading advertising. They merely regulate the display of advertising on *price* signs and define such signs as including those which employ the words "save", "off", "discount", "less", or words of similar import. *Price* signs must show the total price per gallon, including taxes, the brand name, and may contain words of description of the product. On *price* signs, no other advertising may be displayed. Any other advertising of any other character, including the words "Serve Yourself", may be displayed on any other sign, anywhere upon the premises.

It is stated at page 4 of the *Statement as to Jurisdiction* that appellants maintained and displayed their signs prior

to October 1, 1949. That was the date the most recent amendment to the law became effective and the statement permits an inference that the law was in this respect enacted after the appearance of such advertisements. In fact, the basic provisions of the law have existed in California since 1931; in 1949 the law was amended to *permit* display of the words "save", "off", "discount", and "less", under certain conditions.

At page 6 of said *Statement*, it is asserted that the question raised by appellants is substantial and that "there are decisions in five states interpreting legislation designed to regulate the 'Serve Yourself' gasoline industry and many of the decisions are conflicting". It is asserted that a ruling by this Court will enlighten the industry because the California statutes are more detailed. In our view, appellants have not met the requirement of Rule 12 in that the statement of grounds does not support appellants' contention that the question is substantial. We are aware of no cases, and appellants have cited none at any stage of the proceedings over the course of the years, which interpret legislation designed to regulate the "Serve Yourself" gasoline industry. The plaintiff Urich filed an affidavit on behalf of all plaintiffs in support of an application for temporary restraining order and preliminary injunction. He there recited that Serve Yourself Gasoline Stations Association, Inc., was the originator of the "Serve Yourself" type of merchandising in the United States and that the first such station commenced operation in May, 1947. All but two of the cases cited and considered arose prior to 1947; *Levy* v. *City of Pontiac* (Mich., 1951), 49 N. W. 2d 80, and *State* v. *Hobson* (Dela., 1951), 83 A. 2d 846 arose later. However, as in the earlier cases, there is no intimation in either case that the affected business was a "Serve Yourself" type operation and the statutes were not in terms

directed at such operations. Said affidavit was not a part of the record on appeal. Copy of the document, certified by the clerk of the trial court, is appended hereto as Exhibit "C".

It is true that there is a conflict among decisions of other states with respect to the somewhat uniform statutory requirements of those states. But it is absolutely not true that there is a conflict between the decisions of any such states and the decision of the California Supreme Court from which an appeal is here sought. The California law is wholly unlike the laws of other states. Our law does not forbid the display of price signs nor does it establish a maximum size of signs or of lettering used upon such signs. All of the cases cited and relied upon by appellants at all stages below concern laws which limit the size of lettering upon price signs or the placement of price signs upon the premises. We maintain and our Supreme Court has determined that the California law differs substantially. As our court has correctly declared, in *other* states the "right to maintain signs of a sufficient size to be read by the passing motorist was prohibited".

A cursory examination of the cases cited by appellants at page 7 of their *Statement as to Jurisdiction* will disclose that appellants err when they state that *Regal Oil Co.* v. *State*, 10 A. 2d 495, reviewed a statute similar to the California law, and that the case of *State* v. *Miller*, 12 A. 2d 192, was to similar effect. Such an examination will demonstrate that appellants are also in error when they assert that the decision here sought to be reviewed is "in direct conflict with these decisions". Moreover, and contrary to the statement of appellants, *Slome* v. *Godley*, 23 N. E. 2d 133 does not uphold a statute regulating "Self-Service stations",—although it does uphold a law regulating display of price advertising at gasoline stations.

Throughout their said *Statement*, appellants urge that the California law is an attempt to legislate out of existence a welcome and necessary industry. This is not true. The California law existed for many years prior to the instant method of merchandising and is merely concerned with truthful advertising. Its regulations extend to all operators who elect to display a price sign, whether the merchandising is done by "serve-yourself" or conventional methods. Such operators may or may not advertise price. If they do, they must set forth the price fully and they may not display other advertising upon the price sign although they may display words of description of the product offered for sale.

The cross-complaint appended 18 examples of advertising which the parties stipulated are replicas of existing signs in this State. Some of such signs proclaim "Serve Yourself and Save" in large letters and display, in obscure print, the words "time", "minutes", and other such unrelated references. Additionally, the words "Save 5" and other such expressions can be registered as brand names in this State. The Petition for Hearing in the California Supreme Court includes, as Appendix "A" two exemplars of Claims for Registration of Trade-Marks, as certified by the Secretary of State, State of California. The claims concern the trade-marks, "5 Off" and "Save 5". It is obvious that a sign reading "Serve Yourself Save 5" can be highly misleading. The exemplars of claims appear in said Petition, following page 15; the Petition has been designated as a part of the record on appeal by appellees' Counter-Praecipe. The Court will take judicial notice of the many reasons that sustain a legislative enactment of this sort and will observe that signs may be so arranged and worded as to deceive and confuse the motorist. In consequence, the Court will conclude that desirability of a

statute is not a matter for judicial inquiry but resides in the discretion of the Legislature (*Daniel* v. *Family Life Ins. Co.*, 336 U. S. 220; see, also, Note in *93 L. Ed. 637*).

WHEREFORE, appellees respectfully submit that the within Statement asserts sufficient grounds making against the jurisdiction of this Court and that the accompanying Motion to Dismiss, or, in the alternative, the Motion to Affirm, should be granted.

Respectfully submitted,

EDMUND G. BROWN,
Attorney General,
FRANK J. MACKIN,
Asst. Attorney General,
Counsel for Appellees.

JOHN F. HASSLER,
Deputy Attorney General,
Of Counsel.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SERVE YOURSELF GASOLINE STATIONS ASSOCIATION, INC., a corporation, et al., Plaintiffs, Appellants and Cross-Defendants,

vs.

A. A. BROCK, as Director of the Department of Agriculture of the State of California, et al., Defendants, Respondents and Cross-Complainants,

UEICH'S SERVE YOURSELF STATIONS, INCORPORATED, a California corporation, et al., Intervenors, Appellants and Cross-Defendants

MOTION TO DISMISS AND ALTERNATIVELY, IF SAID MOTION BE DENIED, MOTION TO AFFIRM

Come now defendants, respondents and cross-complainants, appellees herein, and move the Court to dismiss the within appeal upon the following ground:

1) The Assignment of Errors is too general and presents no question for consideration.

Rule 9, Supreme Court Rules, stipulates that an Assignment of Errors "shall set out separately and particularly each error asserted." Appellants assign two purported errors, as follows:

"1. In holding that Sections 20880, 20882, 20883, 20884, 20885 and 20886 of the Business and Professions Code of the State of California are valid and unconstitutional.

2. In holding that the named sections are not being unconstitutionally applied so as to deprive appellants

> of their property without due process of law, when applied to a sign reading: 'Serve Yourself and Save.' "

Patently, the purported Assignment of Errors does not comply with the object of the Rule in that it does not specify the points upon which appellants rely and thus enable appellees to appraise such points and limit the discussion to them. (*Phillips & Colby Construction* v. *Seymour*, 91 U. S. 648.) The first assignment does not challenge the decision of the California Supreme Court with any particularity. It cannot be ascertained wherein and for what reasons appellants consider said decision erroneous. The second assignment concerns the alleged unconstitutional application of the California law and does not point out the manner in which the law is so applied as to appellants or the activities of appellants which are deemed to be singled out and to be the subjects of discrimination. An Assignment of Errors which is so general that it presents no question for consideration may be disregarded by this Court (*Seaboard Airline Ry. Co.* v. *Watson*, 287 U. S. 86).

Wherefore, appellees respectfully move the Court to dismiss the appeal herein.

In the event said Motion be denied, appellees further move the Court to affirm the decision of the Supreme Court of the State of California upon the following ground:

> 1) The question is so wanting in substance as to require no argument.

It is universally held that a state has the right under its police power to legislate for the prevention of false and misleading advertising (See: Ann. Cas. 1916A, 900; 89 A.L.R. 1004; 11 Am. Jur. 1043; 2 Cal. Jur. 2d 606).

Wherefore, appellees respectfully move the Court to affirm the decision of the Supreme Court of the State of California.

Respectfully submitted,

EDMUND G. BROWN,
Attorney General,
FRANK J. MACKIN,
Asst. Attorney General,
Counsel for appellees herein.

JOHN F. HASSLER,
Deputy Attorney General,
Of Counsel.

EXHIBIT "A"

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 565,702

SERVE YOURSELF GASOLINE STATIONS ASSOCIATIONS, INC., a corporation, et al., Plaintiffs,

vs.

A. A. BROCK, as Director of the Department of Agriculture of the State of California, et al., Defendants

MEMORANDUM RULING

In *Brock* v. *Superior Court*, 12 Cal. 2d. 605, the factual allegations in the complaint supported the conclusions that the law either was unconstitutional or was being unconstitutionally applied.

The court does not feel that the allegations in the first and second causes of action support the conclusions of law which are pleaded in paragraph XIII of the first cause of action. (See *Callahan* v. *Broderick*, 124 Cal. 80.)

The third cause of action is for declaratory relief, and such a cause of action may be maintained against the state (*Lord* v. *Garland*, 27 Cal. 2d 840), and the facts pleaded sufficiently show the nature of the controversy and the rights which plaintiffs seek to have declared. A plaintiff is entitled to maintain an action for declaratory relief even though the facts pleaded do not show that he is entitled to the relief which he seeks. *Maguire* v. *Hibernia Savings & Loan*, 23 Cal. 2d 719.)

Demurrer re capacity of Service Yourself Gasoline Stations Associations, Inc., to sue sustained without leave to amend.

Demurrer to first and second causes of action sustained.
Demurrer to third cause of action overruled.
Ten days to amend first and second causes.
Motion to strike off calendar.

January 31, 1950.

Arnold Praeger, Judge.

EXHIBIT "B"

In the Superior Court of the State of California in and for the County of Los Angeles

No. 565,702

Serve Yourself Gasoline Stations Association, Inc., a Corporation; et al., Plaintiffs,

vs.

A. A. Brock, as Director of the Department of Agriculture of the State of California, et al., Defendants

Notice of Ruling

To the Defendants and to Fred N. Howser and John F. Hassler, Their Attorneys:

You and each of you will please take notice that by an order duly given and made the above court on the 31st day of January, 1950, overruled the demurrer of the defendants to the third cause of action of plaintiff's amended complaint on file herein. You are further notified that plaintiffs do not intend to file an amended complaint and therefore defendants have ten days within which to answer the third cause of action of the amended complaint on file herein.

Dated: February 6, 1950.

Guthrie, Darling & Shattuck,
By Milo V. Olson,
Attorneys for Plaintiffs.

Salisbury & Knudson,
By Gerald Knudson,
Attorneys for Plaintiff,
A. F. Gilmore Company.

EXHIBIT "C"

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

No. 565,702

SERVE YOURSELF GASOLINE STATIONS ASSOCIATION, INC., a corporation et al., Plaintiffs,

vs.

A. A. BROCK, et al., Defendants

AFFIDAVITS AND SUPPLEMENTAL AFFIDAVITS IN SUPPORT OF APPLICATION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

STATE OF CALIFORNIA,
County of Los Angeles, ss:

GEORGE R. URICH, being first duly sworn, deposes and says: That he is President of Urichs Serve Yourself Stations, Inc. Said corporation is a California corporation authorized to do business and doing business in the County of Los Angeles, State of California. That said corporation is a member of the association of serve-yourself gasoline stations represented by plaintiff Serve Yourself Gasoline Stations Association, Inc. That said corporation has a common interest in the subject matter of the Superior Court action No. 565702, and with the plaintiffs in said action. Affiant makes this affidavit on behalf of said corporation. Said corporation originated the self-service type of gasoline station in the United States, and particularly in the State of California. Said corporation maintains and operates thirteen of such stations in California. The first station of that type operated by said corporation commenced doing business in May, 1947. On each of said stations there is maintained a large neon sign, 13 feet by 24 feet in size. Attached hereto, marked Exhibit "A" and made a part hereof, is a picture of said sign. Fifteen of such signs are maintained by said corporation. Said signs each cost

approximately $1800. Affiant on this date ascertained the cost of removing from each of said signs the lettering and words "Save 5c a Gal." The cost to remove the tubing and blank out said words is $50 for each side of the sign. All of the signs except one have two sides, so the cost of changing the two-sided signs is $100, and $50 for the one-sided sign. The cost, therefore, to Urich's Serve Yourself Stations, Inc., to change said signs to conform with Sections 20880 and 20884 of the Business and Professions Code would be $1450. In the event it is determined that said sections of said statute are unconstitutional said corporation would be greatly damaged and irreparably damaged in the sum of $1450. Further, the nature of the self-service gasoline station business is that said stations compete with major oil companies who sell nationally advertised brands of gasoline. That patrons and customers can only be successfully attracted to the self-service type of gasoline station by large signs advertising that by serving themselves customers can save money. Otherwise the customers as a result of the national advertising will purchase the nationally advertised brands. By reason thereof such type of sign is absolutely essential to successful operation of a self-service station. Affiant has been engaged in the gasoline service station business for a period of twenty years. Affiant is qualified, in his opinion, to express an opinion as to the trend of business and the effect of advertising and signs of gasoline business. In the opinion of affiant of the sign, copy of which is attached hereto marked Exhibit "A", is removed or covered up, the business at the self-service stations operated by Urich's Serve Yourself Stations, Inc., would fall off approximately 20% to 50%. Those stations operated by Urich's Serve Yourself Stations, Inc., located on major highways where the customer trade is primarily transient would suffer a loss of approximately 50%. Two of the self-service stations operated by said corporation are located on such through highways and would be so affected. In the opinion of affiant the dollars and cents loss on each of said stations per day would be approximately a gross loss of $333 a day and a loss of net profit of $52 a day, and the Urich's Serve Yourself Stations, Inc., would therefore

lose each day approximately $650 net. That said loss is great and is irreparable because in the event said corporation is required to cover said sign or remove said sign pending a hearing on a preliminary injunction or the trial of the foregoing action such loss could not be recovered from any of the defendants. Further, in addition to said actual loss of profits, said service stations would not be operating at a profit, by reason thereof the market value and the value of the investment of each of said self-service type of station would be reduced and jeopardized and said corporation would suffer great and irreparable damage to its investment in each of said stations. In other words, unless that type of station can operate as a self-service station, it is practically valueless; the self-service type of station cannot compete and operate at a profit unless it is able to maintain signs similar to the exemplars set forth as Exhibits "B", "C" and "D" in the foregoing action, or to Exhibit "A" attached to this affidavit, that is, compete with major oil companies who sell nationally advertised brands of gasoline. The gasoline sold at the service stations operated by Urich's Serve Yourself Stations, Inc., is not a nationally advertised brand, although it is a gasoline that is comparable in quality to nationally advertised brands. Further, in order to put up a sign which would attract customers to a self-service type of gasoline station and also meet the requirements of Sections 20880 and 20884 of the Business and Professions Code, it would require the following: First, $100 expense on each of the present signs to remove the words and figures "Save 5c a Gal." and, second, the erection of a new sign of equal size or larger which would have the words "Urich's Serve Yourself Stations, Inc." stating the name of the gasoline and setting forth the price of the gasoline sold. The cost of so doing would be approximately $2500 for each station. Said corporation would be forced and required to do that in order to protect its business and its investment. Such loss would be great and irreparable.

WHEREFORE, affiant prays that a temporary restraining order and preliminary injunction issue enjoining and re-

straining the defendants from enforcing said provisions of the Business and Professions Code pending the trial of this action.

GEORGE R. URICH.

Subscribed and sworn to before me this 5th day of October, 1949.

[SEAL.] A. RUSSELL,
Notary Public in and for said County and State.

My Commission Expires Oct. 17, 1952.